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No. 493

In the Supreme Court of the United States

OCTOBER TERM, 1958

LEO PETER REISTROFFER, W. L. ROGERS AND MARVIN NORRIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and rules involved	2
Statement	4
Argument	8
Conclusion	16

CITATIONS

Cases:	
Clune v. *United States*, 159 U. S. 590	9
Crumpton v. *United States*, 138 U. S. 361	14
Grell v. *United States*, 112 F. 2d 861	9
Hyde v. *United States*, 225 U. S. 347	11
Michelson v. *United States*, 335 U. S. 469	12
Sugarman v. *United States*, 249 U. S. 182	10
Tatum v. *United States*, 190 F. 2d 612	10
United States v. *Phillips*, 217 F. 2d 435	10
Statute and rules involved:	
18 U. S. C. 1341	2
F. R. Crim. P.:	
17 (b)	3, 14
28	4

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 23–54) is reported at 258 F. 2d 379.

JURISDICTION

The judgments of the Court of Appeals were entered July 29, 1958 (Pet. App. 55–57), and petitions for rehearing were denied on September 11, 1958. On October 2, 1958, Mr. Justice Whittaker extended the time for filing a petition for certiorari to and including November 5, 1958. The petition for a writ of certiorari was filed on November 5, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a trial for mail fraud involving numerous transactions, the court, before receiving testimony of each victim, should have instructed the jury as to the admissibility against co-defendants of declarations by a co-conspirator, in a case which the subject was fully covered in the instructions to the jury.

2. Whether the court erred in refusing requested instructions which were not supported by the evidence, amounted to comments upon the evidence, or were covered by other instructions.

3. Whether the statements of one conspirator were properly admitted as having been made during the course of the scheme.

4. Whether one defendant should have been allowed to ask leading questions of a co-defendant or of a friendly defense witness under the guise of cross-examination.

5. Whether the court abused its discretion in denying process at government expense for an expert witness requested by an indigent defendant, where at best that witness could testify only to a collateral issue.

STATUTE AND RULES INVOLVED

18 U. S. C. 1341 provides:

> § 1341 *Frauds and swindles.*
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish

or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Rule 17 (b) of the Federal Rules of Criminal Procedure provides:

(b) *Indigent Defendants.*

The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness. If the court or judge orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in

the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

Rule 28 of the Federal Rules of Criminal Procedure provides:

> Rule 28. *Expert Witnesses.*
>
> The court may order the defendant or the government or both to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the court or by any party. He shall be subject to cross-examination by each party. The court may determine the reasonable compensation of such a witness and direct its payment out of such funds as may be provided by law. The parties also may call expert witnesses of their own selection.

STATEMENT

Petitioners and four others were indicted in the Northern District of Iowa for devising a scheme to defraud and to obtain money by false and fraudulent promises (R. 1–28). Petitioners Leo Peter Reistroffer and W. L. Rogers were each convicted on 26 counts of using the United States mails for executing

the scheme and received five year concurrent sentences on each count (R. 966–967, 977–979). Petitioner Marvin Norris was convicted upon four similar counts and was given one year concurrent sentences on each count (R. 967–968, 980–981). The Court of Appeals affirmed. 258 F. 2d 379.

The evidence is summarized in the opinion of the Court of Appeals (Pet. App. 26–32) and its sufficiency is not challenged here. In brief it showed an organized scheme to get money for vending machines on the basis of false representations and promises.

The indictment charged 20 specific false representations and promises used to carry out the scheme and sell various vending machines and products (R. 7–11), including false promises of profit, false representations as to immediate delivery, and false statements concerning help in installation or securing good locations for the products (R. 8–10). The proof of these false representations extended from 1948 into 1954 (R. 1, 118, 747), covered machines for selling candy, nuts, coffee and chlorophyll pellets (R. 85, 576–589, 748), sold under such company names as National Advanced Vending Co. or Continental Merchandising Corporation (R. 85, 747). During the course of the trial 59 purchasers testified.

The mode of operation may be summarized as follows: An advertisement was placed in a newspaper (R. 149, 234), describing an automatic machine, stating that factory distributors or others would secure locations; that $200 to $400 earnings per week were possible, and that the business was to be established immediately. After the purchaser answered the ad-

vertisement, an appointment was made in a good room in a leading hotel (R. 57). The salesman, who had been given explicit instruction in selling technique, determined how much money the prospect could furnish (R. 58; see, *e. g.*, R. 576–594) and made various representations as to the product (R. 528–532, 569–576). The purchaser signed a contract (R. 85, 157, 703) and the salesman secured a check which was immediately cashed (R. 62, 750). Eventually the purchaser received the product.

Actually the machines were not automatic (R. 286) and no one returned to help install the machines (R. 363). Although ads indicated the business was to start immediately, such items as coffee vendors, for which ads appeared as early as January 1952 (R. 362), were not even built until June 1952 (R. 617, 641; see R. 167–189). Although promised profits ranged from $400 per month (R. 83) to $200 to $400 per week for part time work (R. 149), not one of the 59 witnesses testified to grossing sufficient to cover costs. (See, *e. g.*, R. 705–706; R. 165.)

The evidence disclosed that petitioner Leo Peter Reistroffer organized, was in charge of the office and, on occasion, sold for National Advanced Vending Co. (R. 51–53), one of the selling companies. He and petitioner W. L. Rogers were partners in, and organized, Advanced Advertising Associates (R. 700) which was later run by Violet E. Sheean, sister-in-law of Reistroffer (R. 51, 77) and which placed ads for National Advanced Vending Co. and later for Continental Merchandising Corp. (R. 600–601, 645, 681–684). W. L. Rogers was National Sales Director

(R. 133, 661) and also sold as a distributor (R. 362). Continental Merchandising Corporation was organized in 1952 (R. 51, 52, 78). Although others appeared to control that corporation, Rogers was in practical control because he had a contract with the corporation through which he exercised full control of the salesmen, had exclusive rights to decide what products would be sold and received two-thirds of the gross profits (R. 677–680). Reistroffer was regularly in the office of Continental Merchandising Corporation where he was consulted about problems (R. 676) and also sold for the corporation, using the name Randell (R. 78, 680). Petitioner Marvin Norris was identified as a salesman for National Advanced Vending Co. (R. 204, 206, 212, 508, 513, 579) and identified in the Continental Merchandising Corporation office (R. 683).

Part of the alleged scheme was the transfer of activities, and concealment thereof, between National Advanced Vending Company and Continental Merchandising Corporation (R. 5, par. 14). In September, 1952, both Rogers and Reistroffer attended a meeting where stock of Continental was transferred to a Martin Underwood (R. 675), although, as noted *supra*, Rogers retained control of the corporation. On that same date Rogers told Underwood that it was his (Rogers) job to worry about the salesmen (R. 675). From September on, Reistroffer was consulted about Continental Merchandising Corporation problems from time to time (R. 682).

On December 17, 1952, James T. Nelson, postal inspector, interviewed Reistroffer about the activities of

National Advanced Vending Company (R. 657–658) and Reistroffer was asked whether he had anything to do with Continental Merchandising Corporation. He replied "they are competitors" (R. 663). Reistroffer also wrote inspector Nelson a letter dated December 22, 1952 (R. 664), in which he stated he was quitting the vending machine business (R. 668).

ARGUMENT

The questions raised by petitioners largely involve issues as to the admissibility of evidence and instructions to the jury which relate to the particular factual situation of this case. No question of general importance nor conflict among the circuits is presented and there is no occasion for further review by this Court.

1. Petitioners argue (Pet. 11–13) that, before each purchaser was allowed to testify to the sales talk given him and the letters sent to him, the jury should have been instructed, as requested, that statements made by one defendant would not be binding on others unless a common plan was proved. The trial court early made inquiry as to whether evidence which was otherwise hearsay as to some petitioners would be connected, and upon being assured that it would be, allowed the evidence to come in subject to a later determination of its ultimate impact (R. 82, 83, 95, 96). In the instruction, to which no objection was taken, the jury was told (R. 932):

> In the present case the Government has presented evidence as to statements made in the absence of the different defendants. Before you may consider such evidence as to any defendant,

> you must first find that the Government has by evidence apart from such statements established beyond a reasonable doubt (1) that the particular defendant and the person or persons making the statement or statements had knowingly and intentionally participated in devising the scheme described in the Indictment, and (2) that the statement or statements were made pursuant to such scheme and in furtherance thereof.

The procedure followed here is that frequently employed in conspiracy cases. It has long been the rule that much discretion must be left to the trial judge in such matters. *Clune* v. *United States,* 159 U. S. 590. Here, if there was a scheme which involved the salesmen, the testimony of the purchasers as to what was said during the course of the scheme was admissible against all. Since there was ample direct evidence tying each petitioner to the scheme, submission of this evidence to the jury was fully justified. *Grell* v. *United States,* 112 F. 2d 861 (C. A. 8).[1]

2. Petitioners complain because the trial court refused or failed to give instructions which they label "theory of defense" (Pet. 14). Of the requested instructions listed, the court refused completely only one, that the jury be instructed that Reistroffer claimed that he made no fraudulent statements and

[1] Petitioners cite cases (Pet. 12–13) calling for limiting instructions at the time evidence is introduced where the testimony sought to be elicited has reference to events subsequent to the conspiracy and thus is known to relate only to one defendant. These cases are inapposite here where all the testimony relates to declarations or letters during the course of and in furtherance of the scheme.

did not intend to deceive (R. 848-849). Since Reistroffer did not testify, the question of his intent and whether his statements were fraudulent had to be decided from all the circumstances of the case. This was the basic issue to be decided by a jury. It was a "theory of defense"[2] only in so far as the theory of the defense was that petitioner was not guilty of the charge. The jury was told that there was a plea of not guilty and that the government had the burden of proving beyond a reasonable doubt all the elements of the crime, including intent and fraudulent statements. No further comment was required.

All other requested instructions upon which there is complaint were either given in substance or otherwise covered. Petitioners complain about refusal to instruct that the purchase order sent customers warned them not to rely on representations not contained therein (Pet. 15). However, the court indicated that it would give an instruction on the document (R. 854), and did so at the end of Instruction 9 (R. 931). Petitioners also complain about the refusal to give several instructions as to acting in good faith. Actually this was covered in Instruction 8a (R. 930). Certainly, a judge is not obligated to adopt the exact language requested, nor repeat instructions already given in substance. *Sugarman* v. *United States*, 249 U. S. 182, 185.

[2] Examples of "theories of defense" are insanity (*Tatum* v. *United States*, 190 F. 2d 612 (C. A. 10) and reliance upon someone's advice (*United States* v. *Phillips*, 217 F. 2d 435 (C. A. 7)). These call for special instructions because they relate to an affirmative defense. No such defense was asserted here.

3. Petitioners' third question purportedly presents a question of admissibility of evidence "after the completion of an alleged scheme to defraud" (Pet. 2), but its premise is not supported in the record. In December, 1952, Postal Inspector Nelson interviewed petitioner Reistroffer who said that Continental Merchandising Corporation was a competitor. Actually, Reistroffer was interested in Continental before and after this interview (R. 676, 678, 680, 747). As to the other petitioners, Rogers was identified in both National Advance Vending Company and Continental Merchandising Corporation, as was petitioner Norris.[3] Therefore this conversation was during the course of the scheme and made to cover the shift from one company to another. As such it was admissible against all participants. The Court of Appeals found that the statements made to Nelson were "* * * to prevent stop orders against using the mail. They were in furtherance of the same scheme" (Pet. 38).

4. Petitioner Reistroffer called as a defense witness the vice-president of the Silver King Corporation which built some of the products. Counsel for a defendant, not here petitioning, was not allowed to ask him leading questions although he was permitted to examine him (R. 788). The trial court indicated that, as to this friendly defense witness, other defendants

[3] Petitioners (Pet. 6 and 13) state that Norris had no connection with Continental. This does not comport with the record where he is identified in the Continenal office (R. 683). Also, there must be affirmative action to prove withdrawal from what was one continuous scheme, and there is no such testimony as to Norris. *Hyde* v. *United States*, 225 U. S. 347.

could not "under the guise of cross-examination propound leading questions" (R. 789). Petitioners argue that Rogers should have been permitted to cross-examine this witness (Pet. 18). Suffice it to note that Rogers' trial counsel neither asked nor attempted to ask any questions of this witness (R. 783–791).

Petitioners raise a similar complaint as to their right to cross-examine the only defendant (not a petitioner here) who took the stand. Actually the complaint is not as to the right to cross-examine, but solely the restriction upon leading questions (R. 827). It is well recognized that the extent of cross-examination rests largely within the sound of discretion of the trial judge. *Michelson* v. *United States,* 335 U. S. 469. Here there was a friendly witness and no occasion for leading questions.

5. The last question concerns a handwriting expert and pertains solely to petitioner Norris. One purchaser, Joe A. Diehl, identified Norris as the salesman who sold him some products. Norris was accompanied by a man called G. W. Cox (R. 579) who, at the trial, was identified as Paul Kenneth Brown (R. 577). Diehl noted there was a controversy as to which salesman's name was to be affixed to the contract (R. 591–592). He believed that Cox signed the contract (R. 580), although he did not know which one filled it in (R. 593–594).

Another purchaser, Harry Rayner, dealt with a man called Marvin Norris, who was identified at the trial as Paul Kenneth Brown (R. 203). The purchaser in substance testified that Brown signed the contract "Marvin Norris" (R. 205). A few days later when Rayner called the hotel room, a man who did not give

his name came to the lobby and told Rayner that the salesman had left and that Rayner had "the best deal in San Diego" (R. 204–206). Rayner identified this man at the trial as petitioner Marvin Norris (R. 204).

A third purchaser, L. B. Leid, was sold by Marvin Norris and another salesman whom he thought was Brown (R. 513–514). He was not given the contract (R. 515), but saw Marvin Norris sign it (Ex. BK, R. 520).

A further purchase was made by Ruth W. Dobson, who identified Marvin Norris as the person who signed her contract "G. W. Cox by Marvin Norris" (R. 508, 511–512).

Norris was also identified, again in the company of salesman Brown, in the office of Continental Merchandising Corporation (R. 683).

In rebuttal of this testimony, Norris offered two alibi witnesses to cover the period of time when he was identified as signing the Leid and Dobson contracts (R. 765, 804–805). He also offered Mrs. Dobson's attorney who stated that Marvin Norris was not the person who came to his office in connection with signing the Dobson contract (R. 764–765).

The trial had begun April 23 (R. 42). On May 3, Norris requested a subpoena at government expense for a handwriting expert from St. Louis, Missouri, to testify to the Leid and Dobson contracts (R. 568). The trial judge indicated that in his 20 years' experience he had never heard a handwriting expert testify from just looking at signatures and without a chance to test them in a laboratory. The court noted he could subpoena the expert but that he would in all

likelihood say "I am not prepared to testify" (R. 606). Trial counsel apparently agreed with this (R. 606). The trial court further noted that there would be trouble getting genuine signatures without running into conflict with the defendant's rights under the Fifth Amendment (R. 608); that the mere signature on the bond would not be sufficient for an expert who would want many varied samples (R. 609). The court stated "* * * And the record is silent on any offer—that he offered any comparable signatures * * *" (R. 900). The court denied the motion (R. 662).

Under all these circumstances, no error resulted from the refusal to subpoena a handwriting expert. First, this involved a collateral matter. Norris was not charged with signing anything (R. 1–28) nor is this an element of the offense of mail fraud. Second, this is a discretionary matter. Rule 17 (b) of Federal Rules of Criminal Procedure, *supra*, p. 3; *Crumpton* v. *United States*, 138 U. S. 361. Since Norris neither took the stand nor offered comparable handwriting samples, and in view of the belated request in the middle of a long trial, the Court of Appeals was correct in finding that "the refusal of the District Court * * * does not present such abuse of discretion and prejudice to Norris as to require reversal * * *" (Pet. 53). And finally it should be noted that Norris was placed in the scheme by others, such as Joe A. Diehl, apart from any signature evidence. Neither a handwriting witness, nor the tendered alibi witnesses, could contradict Diehl's identification.

As a further point under this question petitioner complains of the government's closing argument. Petitioner's trial counsel together with his present counsel chided the government in their closing arguments for failure to bring in scientific evidence or failure to consult a handwriting expert in connection with Norris (R. 874, 878). The government started to respond to this argument by stating that Norris could put any witness within reach of a subpoena on the stand (R. 897). However, the trial court immediately instructed the jury to disregard the argument by both sides as to handwriting experts and instructed the government not to go further (R. 897). Outside the hearing of the jury the trial court later denied a motion for mistrial (R. 900).

The argument of petitioners' counsel was not, as he contends, proper comment on failure to call a material witness since proof of handwriting was not part of the government's case. The trial court acted correctly in instructing the jury to disregard the argument of both sides on this issue. In view of his prompt instructions when the government started to answer petitioners' argument, the claim of prejudice is without foundation.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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